Supreme Court, U. S.
FILED
FEB 23 1978
MICHAEL RODAK, JR., CLERK

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-693

HONORABLE HUBERT L. WILL,
Judge, United States District Court for
the Northern District of Illinois,

Petitioner,

v.

CALVERT FIRE INSURANCE COMPANY,

Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 14, 1977
CERTIORARI GRANTED JANUARY 9, 1978

IN THE

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CHRONOLOGICAL LIST OF SELECTED DOCKET ENTRIES

May 26, 1976—Notice of filing Petition for Writ of Mandamus.

May 26, 1976—Petition for Writ of Mandamus.

September 16, 1976—Oral argument; heard and taken under advisement.

November 5, 1976—Additional authority submitted by Calvert.

August 15, 1977—Opinion of United States Court of Appeals for the Seventh Circuit.

September 6, 1977—American Mutual's motion for stay of writ of mandamus and for stay of operation of writ of mandamus pending petition for certiorari.

September 16, 1977—Order that operation of writ of mandamus is stayed until October 17, 1977.

October 7, 1977—Order that Calvert's motion to vacate order of September 16, 1977 staying operation of writ of mandamus is denied; stay will continue in effect until October 17, 1977.

October 14, 1977—Motion of Honorable Hubert L. Will to extend order staying operation of writ of mandamus until November 14, 1977.

October 17, 1977—Order that motion of Judge Will to further stay operation of writ of mandamus is granted, and proceeding is stayed until November 14, 1977.

November 17, 1977—Notice from Supreme Court dated November 14, 1977 that this case has been docketed as No. 77-693.

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

No.

CALVERT FIRE INSURANCE COMPANY,
Plaintiff-Petitioner,

v.

HONORABLE HUBERT L. WILL,
Judge of the United States District Court for the Northern District of Illinois,
Respondent,

and

AMERICAN MUTUAL REINSURANCE COMPANY,
Defendant-Respondent.

Notice of Filing of Petition for Writ of Mandamus

HONORABLE HUBERT L. WILL,
Judge Presiding

NOTICE OF FILING OF PETITION FOR WRIT OF MANDAMUS OF CALVERT FIRE INSURANCE COMPANY

To: Honorable Hubert L. Will,
Judge of the United States District Court,
Courtroom 2341
219 South Dearborn Street
Chicago, Illinois, 60604

Messrs. Thomas J. Weithers and John L. Kirkland
69 West Washington Street
Chicago, Illinois, 60602
Attorneys for AMERICAN MUTUAL REINSURANCE COMPANY

PLEASE TAKE NOTICE that on Wednesday, May 26, 1976, the undersigned has caused to be filed with the Clerk of the United States Court of Appeals for the Seventh Circuit the Petition for Writ of Mandamus of CALVERT FIRE INSURANCE COMPANY, a copy of which is attached hereto and served upon you.

MICHAEL L. WEISSMAN
Attorney for
CALVERT FIRE INSURANCE COMPANY

Aaron, Aaron, Schimberg & Hess
33rd Floor East
One First National Plaza
Chicago, Illinois, 60603
236-8552

(Certificate of Service Omitted in Printing.)

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

(Title Omitted in Printing.)

PETITION FOR WRIT OF MANDAMUS OF CALVERT FIRE INSURANCE COMPANY

Now comes CALVERT FIRE INSURANCE COMPANY ("Calvert") and petitions this Court that the HONORABLE HUBERT L. WILL, Judge of the United States District Court for the Northern District of Illinois, be required by Writ of Mandamus to vacate his Opinion and Order of May 6, 1975 and proceed to adjudicate your Petitioner's cause of action under Section 10(b) of the Securities and Exchange Act of 1934.

In support of this Petition, your Petitioner respectfully represents unto this Court as follows.

The Issue Raised by This Petition

The question which this Petition raises for review is whether or not a District Court should adjudicate a cause of action under Section 10(b) of the Securities and Exchange Act of 1934 (the "1934 Act") seeking both money damages and equitable relief when the same parties are involved in a declaratory judgment proceeding in a state court in which Section 10(b) is raised as an affirmative defense.

The District Court's ruling that it should not make the adjudication followed from this Court's decision in *Aetna State*

Bank v. *Altheimer*, 430 F. 2d 750 (7th Cir. 1970). Because the District Court followed *Aetna*, the decision below (Exhibit "A" hereto) is correct based upon the law in the Seventh Circuit at this time. But *Aetna* is not consistent with the Congressional policy embodied in Section 27 of the 1934 Act giving "exclusive jurisdiction" of "all suits in equity and actions at law brought to enforce any liability or duty created by" the 1934 Act. 15 U.S.C. §78aa.

Even the District Judge believes that the decision in *Aetna* has had unfortunate implications[1]. Furthermore, *Aetna* is in conflict with both the decision of the Second Circuit in *Movielab, Inc.* v. *Berkey Photo, Inc.*, 452 F. 2d 662 (2nd Cir. 1971), *aff'g*, 321 F. Supp. 806 (S.D.N.Y. 1970) and the very recent opinion of the Third Circuit in *Cotler* v. *Inter-County Orthopaedic Association*, 526 F. 2d 537 (3rd Cir. 1975).

Because this Court's decision in *Aetna* is in conflict with the policy of Congress that *exclusive* jurisdiction of a cause of action under Section 10(b) of the '934 Act be vested in the federal courts and is contrary to the Second Circuit's opinion in *Movielab* and the Third Circuit's opinion in *Cotler*, it is important that this issue again be considered by this Court[2]. Although mandamus may seem to be a cumbersome way to raise the issue, it is the only way in which the question could be raised in this Court in light of the record below.

Status of The Proceeding

1. Calvert filed this action on January 10, 1975 seeking relief under the Securities Act of 1933, the Securities Exchange

[1] Tr. 4/9/75, p. 23. See also, *McGough* v. *First Arlington National Bank*, 519 F. 2d 552 (7th Cir. 1975) wherein Judge McGarr was told he had "misapplied the rationale of Aetna . . .".

[2] The instant petition does not challenge Judge Will's ruling abating those of Calvert's claims for relief with respect to which there is *concurrent* federal and state court jurisdiction; it is directed solely to Calvert's Section 10(b) claim.

Act of 1934, the Illinois and Maryland Blue Sky laws and for common law fraud. It stemmed from Calvert's assertion that defendant, AMERICAN MUTUAL REINSURANCE COMPANY ("Amreco"), had fraudulently induced it into acquiring a participatory interest in Amreco's 1974 Multiple Line Pool. The federal securities law counts of Calvert's complaint were based on Calvert's assertion that the participatory interest which Amreco sold to Calvert (and 99 other Pool participants) was a "security".

2. Amreco responded with a motion to abate or, in the alternative, to dismiss. The motion to abate stemmed from the fact that Amreco had previously filed a declaratory judgment proceeding in the Circuit Court of Cook County, Illinois. The alternative motion to dismiss was premised on the argument that the participatory interest in the 1974 Multiple Line Pool which Amreco issued and sold to Calvert (and the other 99 Pool participants) was not a "security" under either federal or state securities laws and, that even if it were a "security", the McCarran-Ferguson Act precluded the application of the federal securities laws to the transaction.

3. On April 9, 1975 Judge Will indicated he would grant Amreco's motion to abate based upon this Court's holding in *Aetna*. On that same date Calvert asked Judge Will to certify his ruling as an appealable interlocutory decision under 28 U.S.C. 1292(b). In response to this request, Judge Will said he was not deciding the issue at this time,

> " . . . but my predilection, obviously, is to let you raise it with the Seventh Circuit and see if you can get them either to reverse themselves, or narrow the scope of their earlier decision, which it seems to me, has some unfortunate implications." (Tr. 4/9/75, pp. 22-23).

4. On April 21, 1975 Calvert formally requested that Judge Will certify his ruling of April 9, 1975 as an appealable

interlocutory decision under 28 U.S.C. 1292(b). In its motion, Calvert directed Judge Will's attention to the conflict between *Aetna* and the Second Circuit's decision in *Movielab, Inc.* v. *Berkey Photo, Inc.*, 452 F. 2d 662 (2nd Cir. 1971), *aff'g*, 321 F. Supp. 806 (S.D.N.Y. 1970). Judge Will indicated that the request for interlocutory certification should be deferred until a written opinion, then in preparation, was delivered.

5. On May 6, 1975 Judge Will issued his Memorandum Opinion and Order holding that all aspects of this cause should be stayed, excepting only Calvert's claim for money damages under the 1934 Act.

6. The parties then submitted briefs on the "threshold" issue in the case, i.e., is a participatory interest in Amreco's reinsurance pool a "security". Judge Will heard oral argument on this question on May 9, 1975. On that same day, May 9, 1975, all discovery in this proceeding was stayed.

7. On June 19, 1975 Amreco sought to leave to file, as part of the record in this cause, orders which had been entered by Judge Arthur L. Dunne on June 16, 1975 and June 17, 1975 in the state court action holding that participatory interests in the reinsurance pool were not securities and that the application of the federal securities law was barred by the McCarran-Ferguson Act.

8. On June 24, 1975 Amreco moved to dismiss the entire proceeding. On August 21, 1975 Calvert moved for reconsideration of Judge Will's Opinion and Order of May 6, 1975. On September 10, 1975 Judge Will entered an order denying both Amreco's motion to dismiss and Calvert's motion for reconsideration.

9. The case remained inactive until March 1, 1976 when Calvert again moved for reconsideration of the Opinion and Order of May 6, 1975 in light of the decision of the Third Circuit rendered December 1, 1975 in *Cotler* v. *Inter-County Orthopaedic Association*, 526 F. 2d 537 (3rd Cir. 1975).

10. On April 5, 1976 Judge Will entered an order denying Calvert's motion for reconsideration of his Memorandum Opinion and Order of May 6, 1975. This left Calvert no remedy in the federal courts except by Petition for a Writ of Mandamus in conformity with the route taken by the petitioner in *Cotler, supra.*

Why The Writ Should Be Granted

The Writ of Mandamus should be granted directing Judge Will to proceed with Calvert's Section 10(b) action because Calvert has been deprived of the right to proceed in a federal court in an instance in which Congress has unequivocally said it is entitled to do so. To the extent that *Aetna* mandates to the contrary, it is not a good law. It has been so characterized by Judge Will. Thus, at the hearing on April 9, 1975 at which he indicated he was bound by *Aetna* as the controlling law in this Circuit, Judge Will pointedly observed:

> "I would be happy to be reversed on it." (Tr. 4/9/75, p. 22).

Calvert respectfully submits that this Court's ruling in *Aetna* should be reconsidered in light of the opinion in *Cotler* v. *Inter-County Orthopaedic Association, P.A.*, 526 F. 2d 357 (3rd Cir. 1975).

In the *Cotler* case, the Third Circuit issued a writ of mandamus to a District Court directing him to proceed with an action under Section 10(b) of the 1934 Act even though the federal action had been preceded by a New Jersey state court declaratory judgment proceeding.

In its opinion, the Third Circuit said at 526 F. 2d 540: "Here, no matter how long the state court proceedings take, in the end the same district court must take up the § 10(b) claim, which cannot be disposed of by the state court". The court also

said: "The § 10(b) claim may be old and feeble at the end of the state court litigation, but it will not be dead".

However, the most compelling language appears at 526 F. 2d 541-42 where the Court of Appeals, holding that a writ of mandamus should issue, said:

> "*McClellan* v. *Carland,* 217 U.S. 268, 281-82, 30 S. Ct. 501, 54 L. Ed. 762 (1910) holds that a federal court having jurisdiction over a cause of action concurrent with a state court by virtue of diversity of citizenship may not stay its action so as to permit a state court action to be completed first, and that the court of appeals should by a writ of mandamus vacate the stay. *See also County of Allegheny* v. *Frank Mashuda Co.,* 360 U.S. 185, 79 S. Ct. 1060, 3 L. Ed. 2d 1163 (1959); *Meredith* v. *Winter Haven,* 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (1943). *Cf. Thermtron Products, Inc.* v. *Hermansdorfer,* ____ ____ U.S. _____, 96 S. Ct. _____, 46 L. Ed. 2d _____. These cases, dealing with the concurrent jurisdiction of the federal courts, are *a fortiori* authority for the impropriety of staying a federal case involving a cause of action over which federal jurisdiction is exclusive. No court except a federal court can adjudicate the question whether stock in a professional corporation is a security within the meaning of the federal securities law. Although a state court may be able to determine the historical facts in this ongoing dispute, no court except a federal court can apply the governing federal legal standards for compliance with the federal securities law to those facts. Thus this is not a case in which by deferring to a state court a federal court may avoid decision of a federal constitutional law issue, *Railroad Commission* v. *Pullman Co.,* 312 U.S. 496, 61 S. Ct. 643, 85 L. Ed. 971 (1941), or avoid unnecessary friction with the

> administration of state policy, *Burford* v. *Sun Oil Co.,* 319 U.S. 315, 63 S. Ct. 1098, 87 L. Ed. 1424 (1943). If the district court had decided, preliminarily, that stock in a professional corporation is not a security within the meaning of § 10(b)—an issue which was not briefed here and on which we express no view—it would have had discretion to decline jurisdiction over the pendent state claims. *United Mine Workers of America* v. *Gibbs,* 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966). But no valid purpose can be served by an arrangement whereby a plaintiff alleging a cause of action exclusively federal, relegated to state court fact-finding must then return to the federal court to litigate both the federal legal issues and the application of federal law to the facts found in the state court. Litigation over the judgment preclusion effects of the state court decision in such a context probably will be as complex as if the federal court had gone ahead with the entire case. No federal interest, no state interest, and no interest of the parties (other than delay) is served by the stay of the federal case.
>
> A writ of mandamus will issue directing the district court to vacate the order dated February 24, 1975 staying this action and the order dated February 25, 1975 directing the Clerk to administratively terminate the action in his records."

In *Cotler,* the novel question of law which the District Judge was *directed* to decide was the threshold issue of whether stock in a professional corporation was a "security" under the federal securities law. In the instant case, the novel question of law which Judge Will should decide is the threshold issue of whether a participatory interest in a reinsurance pool to which 100 insurance companies contribute is a "security". In each instance, as the Third Circuit noted in *Cotler, supra,* "No court

except a federal court can apply the governing federal legal standards for compliance with the federal securities law . . ."

Cotler poignantly demonstrates that Judge Will should not have declined to rule out of deference to the state court proceedings. Calvert was *entitled* to a ruling. Whatever transpired in the state court proceedings should not have affected Calvert's Section 10(b) claim.

Although Judge Will initially held that Calvert's Section 10(b) claim remained "viable" notwithstanding the abatement order, its longevity has been very short. When advised that Judge Dunne of the Circuit Court of Cook County, Illinois had decided that a participatory interest in the reinsurance pool was not a security under either federal or state law, Judge Will, in effect, abated the Section 10(b) claim.

In so doing, Judge Will clearly misconceived the deference which was due Judge Dunne's ruling. The ruling by Judge Dunne was not *res judicata* for at least two different reasons. First, it is not a final judgment. *State Life Insurance Co.* v. *Board of Education,* 394 Ill. 301, 317, 68 N. E. 2d 525 (1946) ("A final decree is one which finally decides and finally disposes of the merits of the case even though incidental matters may be reserved for consideration."); *American National Insurance Co.* v. *Lee Lim Shee,* 104 F. 2d 688, 692 (9th Cir. 1939) ("No question becomes *res judicata* until it is settled by final and conclusive judgment."). Judge Dunne's ruling was not a final judgment because it does not purport to touch upon many of the issues in the case and is subject to appellate review[3]. Secondly the law is well-settled that the doctrine of *res judicata* does *not* apply to 1934 Act claims over which federal

[3] Judge Dunne did not indend his ruling to be final inasmuch as he has certified questions of law for interlocutory review pursuant to Rule 308 of the Rules of the Supreme Court of Illinois. The certification includes the statement that "the order involves a question of law as to which there is substantial ground for difference of opinion".

courts have *exclusive* jurisdiction. *Moran* v. *Paine, Webber, Jackson & Curtis,* 279 F. Supp. 573, 578 (W.D.Pa. 1966), *aff'd* 389 F. 2d 242 (3rd Cir. 1968); *Wellington Computer Graphics, Inc.* v. *Modell,* 315 F. Supp. 24, 26 (S.D.N.Y. 1970).

Since Judge Dunne's ruling has no *res judicata* effect, it presents no bar to further proceedings before Judge Will. It is, therefore, respectfully submitted that this Court should follow the approach of the Third Circuit in *Cotler* and direct Judge Will to rule upon whether the particular instrumentality involved in the instant case is a security[4].

The approach of the Third Circuit in *Cotler* is fully consistent with the congressional grant of exclusive jurisdiction to the federal courts in Section 10(b) cases. It avoids the anomalous result of *Aetna* wherein District Courts may be compelled to defer from making an adjudication of a cause of action over which Congress has said they have exclusive jurisdiction.

Unless the Writ of Mandamus is granted, Calvert will be forever foreclosed from obtaining any relief in the District Court. In this Circuit, as in the Third Circuit, a stay order is not appealable. *Zalataka* v. *Metropolitan Life Insurance Co.,* 108 F. 2d 405, 406 (7th Cir. 1939). Calvert thus stands in precisely the same position as did the petitioner in *Cotler.* Therefore, unless a Writ of Mandamus issues, Calvert will be totally precluded from asserting a cause of action over which the District Court has exclusive jurisdiction.

The issue presented to the District Court for decision, i.e., whether or not a participatory interest in a reinsurance pool is a security, is a question of first impression. There are no other

[4] Judge Will was clearly of the view that it is desirable that this determination be made within the federal court system, saying:

> "I really think it would be desirable to have federal courts decide what is a security under the federal securities law." (Tr. 4/9/75, p. 23).

reported cases dealing with this issue. The resolution of this issue is of vital importance inasmuch as it affects a multi-million dollar industry whose operations stretch throughout the United States.

WHEREFORE, Petitioner, CALVERT FIRE INSURANCE COMPANY, prays that a Writ of Mandamus issue to the HONORABLE HUBERT L. WILL, Judge of the United States District Court for the Northern District of Illinois, requiring him to adjudicate Petitioner's cause of action under Section 10(b) of the Securities and Exchange Act of 1934.

CALVERT FIRE INSURANCE COMPANY

By: .....

MICHAEL L. WEISSMAN
Its Attorney

Aaron, Aaron, Schimberg & Hess
33rd Floor East
One First National Plaza
Chicago, Illinois, 60603
236-8552

STATE OF ILLINOIS
COUNTY OF COOK } ss.

MICHAEL L. WEISSMAN, being first duly sworn on oath, deposes and says that he is the attorney for Petitioner, CALVERT FIRE INSURANCE COMPANY; that he has knowledge of the facts set forth in the above and foregoing Petition and that the contents of said Petition are true and correct according to the best of his knowledge and belief.

.....

MICHAEL L. WEISSMAN

SUBSCRIBED AND SWORN to before me
this 26th day of May, 1976.

.....

Notary Public

AARON, AARON, SCHIMBERG & HESS

(Names of Individuals deleted
from letterhead in printing.)

November 5, 1976

Thomas F. Strubbe, Esq.
Clerk, United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

By Messenger

Re: Calvert Fire Insurance Company vs.
Hon. Hubert L. Will No. 76-1495

Dear Mr. Strubbe:

Pursuant to Circuit Rule 11, I forward herewith seven copies of a letter citing additional authorities which are pertinent to the above mentioned appeal and should be considered by the court. The letter in question was prepared by my co-counsel, Professor Louis Loss. I would sincerely appreciate your making copies of this letter available to the panel. As required by Circuit Rule 11, copies are being sent to opposing counsel and Judge Will.

Yours truly,

Michael L. Weissman

MLW:meg
Enclosures
cc: Hon. Hubert L. Will
Thomas J. Weithers, Esq.

LOUIS LOSS
ATTORNEY AT LAW

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November 1, 1976

Thomas F. Strubbe, Esquire
Clerk, United States Court of Appeals
for the Seventh Circuit
219 South Dearborn Street
Chicago, Illinois 60604

Re: *Calvert Fire Insurance Company* v. *Will*, No. 76-1495

Dear Mr. Strubbe:

I enclose three additional copies of this letter, which I would appreciate your distributing to the judges in the above case. A copy is, of course, going to opposing counsel.

The purpose of the letter is to bring to the Court's attention a decision of the Supreme Court of the United States on March 24, 1976, which we have just discovered, and which is highly relevant (if not controlling) because of its discussion of the abstention doctrine and related principles. *Colorado River Water Conservation District* v. *United States*, 96 S. Ct. 1236.

The United States, seeking adjudication of reserved rights claimed on behalf of itself and certain Indian tribes (as well as rights based on state law) in waters in certain Colorado rivers, brought an action against some one thousand water users in the United States District Court. Shortly thereafter one of the defendants in that action sought in a Colorado state court to make the Government a party to proceedings there for the

purpose of adjudicating all the Government's claims, both state and federal, pursuant to 43 U.S.C. § 666, which gives consent to join the United States as a defendant in certain suits for the adjudication of water rights. The District Court dismissed the Government's suit on abstention grounds and the Court of Appeals reversed, holding that abstention was inappropriate.

In the Supreme Court the majority of six Justices held (1) that dismissal could not be supported under the abstention doctrine; (2) that there are additional principles that govern in situations involving the contemporaneous exercise of concurrent jurisdiction, whether by federal courts or by state and federal courts; (3) that the circumstances permitting the dismissal of a federal suit because of the presence of a concurrent state action "for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention"; but that (4) under the peculiar circumstances, primarily the enactment of 43 U.S.C. § 666, dismissal of the federal action was justified. The three dissenting Justices agreed with everything in the majority opinion except the conclusion that dismissal was justified under the circumstances.

The relevant language of the majority opinion (with citations and certain other matter deleted as indicated and with emphasis supplied) is as follows (96 S. Ct. at 1244-48):

> Next, we consider whether the District Court's dismissal was appropriate under the doctrine of abstention. We hold that the dismissal cannot be supported under that doctrine in any of its forms.
>
> Abstention from the exercise of federal jurisdiction is the exception, not the rule. "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it. Abdication of the obligation to decide

> cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the state court would clearly serve an important countervailing interest." • • • "[I]t was never a doctrine of equity that a federal court should exercise its judicial discretion to dismiss a suit merely because a State court could entertain it." • • • Our decisions have confined the circumstances appropriate for abstention to three general categories.
>
> (a) Abstention is appropriate "in cases presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law." • • •
>
> (b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar. • • •
>
> • • •
>
> (c) Finally, abstention is appropriate where, absent bad faith, harassment, or a patently invalid state statute, federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings, • • • state nuisance proceedings antecedent to a criminal prosecution, which are directed at obtaining the closure of places exhibiting obscene films • • • or collection of state taxes • • •.
>
> Although this case falls within none of the abstention categories, there are principles unrelated to considerations of proper constitutional adjudication and regard for federal-state relations which govern in situations involving the contemporaneous exercise of concurrent jurisdictions, either by federal

courts or by state and federal courts. These principles rest on considerations of "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." * * * Generally, as between state and federal courts, the rule is that "the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . ." * * * As between federal district courts, however, though no precise rule has evolved, the general principle is to avoid duplicative litigation. * * * This difference in general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from *the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them.* * * * Given this obligation, and the absence of weightier considerations of constitutional adjudication and state-federal relations, the circumstances permitting the dismissal of a federal suit due to the presence of a concurrent state proceeding for reasons of wise judicial administration are considerably more limited than the circumstances appropriate for abstention. The former circumstances, though exceptional, do nevertheless exist.

It has been held, for example, that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. * * * In assessing the appropriateness of dismissal in the event of an exercise of concurrent jurisdiction, a federal court may also consider such factors as the inconvenience of the federal forum, * * * the desirability of avoiding piecemeal litigation, * * * and the order in which jurisdiction was obtained by the concurrent forums * * *. No one factor is necessarily determinative; a carefully considered judgment taking into account both the obligation to exercise

jurisdiction and the combination of factors counselling against that exercise is required. * * * *Only the clearest of justifications will warrant dismissal.*

Turning to the present case, a number of factors clearly counsel against concurrent federal proceedings. The most important of these is the McCarran amendment itself [43 U. S. C. §666]. The clear federal policy envinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. * * *

* * *

> * * * We emphasize, however, that we do not overlook *the heavy obligation to exercise jurisdiction.* * * * But the opposing factors here, particularly the policy underlying the McCarran amendment, justify the District Court's dismissal in this particular case.

It is our submission that, absent the special circumstances that persuaded the majority in the *Colorado River* case, that case establishes that neither the abstention doctrine nor (*a fortiori*) concepts of sound judicial administration justified Judge Will's stay.

Very truly yours

Louis Loss

LL/js
Enclosures

**OPINION OF THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT,
FILED AUGUST 15, 1977, WAS
PRINTED AS APPENDIX 1 TO
THE PETITION FOR CERTIORARI.**

No. 76-1495

IN THE

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

(Title Omitted in Printing.)

MOTION FOR STAY OF WRIT OF MANDAMUS AND FOR STAY OF THE OPERATION OF THE WRIT OF MANDAMUS PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI

American Mutual Reinsurance Company, defendant-respondent, moves that the Court stay the Writ of Mandamus and the operation of the Writ in the above cause pending application to the Supreme Court of the United States for Writ of Certiorari and in support of said motion says:

1. On September 6, 1977, the attorneys for American Mutual Reinsurance Company were advised that the Honorable Hubert L. Will, Judge of the United States District Court for the Northern District of Illinois has requested the United States Attorney for the Illinois Eastern Division to prepare and file with the Clerk of the Supreme Court of the United States a Petition for Writ of Certiorari from the order of this Court entered on August 15, 1977 ordering the issuance of the Writ of Mandamus.

2. The attorneys for American Mutual Reinsurance Company have been informed that the United States Attorney for the Illinois Eastern Division of the Northern District will prepare and file on behalf of the Honorable Hubert L. Will a Petition for Writ of Certiorari to the

Supreme Court of the United States within the time required for the filing of said Petition.

3. That American Mutual Reinsurance Company will prepare and file a Petition for Writ of Certiorari to the Supreme Court of the United States, or, in the alternative, join in the Petition of the Honorable Hubert L. Will for Petition of Writ of Certiorari to the Supreme Court of the United States from the aforesaid order of this Court.

WHEREFORE, American Mutual Reinsurance Company moves that the Court enter an order staying the Writ of Mandamus in the above cause and staying operation of the Writ of Mandamus in the above cause pending the disposition of the aforesaid Petition or Petitions for Writ of Certiorari to the Supreme Court of the United States.

THOMAS J. WEITHERS, Attorney for
Defendant-Respondent

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STATE OF ILLINOIS
COUNTY OF COOK } ss

I, THOMAS J. WEITHERS, being sworn state that I am an attorney at law, a member of the firm of HINSHAW, CULBERTSON, MOELMANN, HOBAN & FULLER, attorneys for the defendant, AMERICAN MUTUAL REINSURANCE COMPANY, in the above-captioned cause and further state that I have read the above Motion for Stay and that the facts set forth in the motion are true and correct.

THOMAS J. WEITHERS

Thomas J. Weithers

SUBSCRIBED AND SWORN TO
before me this 6th day
of September, 1977.

MICHELLE B. MOLSRO

Notary Public

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

September 16, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. _____

Hon. _____

(Title Omitted in Printing.)

On August 15, 1977 this court filed its opinion in this matter granting the petition for writ of mandamus of the Calvert Fire Insurance Company. On September 6, 1977 counsel for the American Mutual Reinsurance Company filed herein its "MOTION FOR STAY OF WRIT OF MANDAMUS AND FOR STAY OF THE OPERATION OF THE WRIT OF MANDAMUS PENDING APPLICATION TO THE SUPREME COURT OF THE UNITED STATES FOR A WRIT OF CERTIORARI." On September 12, 1977 counsel for the petitioner filed herein the "ANSWER OF CALVERT FIRE INSURANCE COMPANY TO THE MOTION OF AMERICAN MUTUAL REINSURANCE COMPANY FOR A STAY OF THE WRIT OF MANDAMUS AND FOR A STAY OF THE OPERATION OF THE WRIT OF MANDAMUS." This court has thoroughly reviewed the aforesaid documents and is fully advised concerning the circumstances of this matter. Accordingly,

IT IS ORDERED that the operation of the writ of mandamus in this matter is hereby STAYED to and including October 17, 1977, in accordance with Rule 41(b) of the Federal Rules of Appellate Procedure.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

Chicago, Illinois 60604

October 7, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge

Hon. _____

Hon. _____

(Title Omitted in Printing.)

This matter comes before the court for its consideration upon the filing herein of the following documents:

1. The "'MOTION OF CALVERT FIRE INSURANCE COMPANY, PLAINTIFF-PETITIONER, TO VACATE THIS COURT'S ORDER STAYING THE OPERATION OF THE WRIT OF MANDAMUS" filed herein on September 29, 1977 by counsel for the petitioner.

2. The "RESPONSE OF AMERICAN MUTUAL REINSURANCE COMPANY TO CALVERT'S MOTION TO VACATE THIS COURT'S ORDER STAYING THE OPERATION OF THE WRIT OF MANDAMUS" filed herein on October 5, 1977 by counsel for the respondent American Mutual Reinsurance Company.

This court has thoroughly reviewed the aforesaid documents and is fully advised concerning the circumstances of this matter. Accordingly,

IT IS ORDERED that the motion of the petitioner to vacate this court's order of September 16, 1977 staying the operation of the writ of mandamus is hereby DENIED. The stay granted in this court's order of September 16, 1977 will continue in effect until October 17, 1977, in accordance with Rule 41(b) of the Federal Rules of Appellate Procedure.

United States Court of Appeals

FOR THE SEVENTH CIRCUIT

(Title Omitted in Printing.)

MOTION OF HONORABLE HUBERT L. WILL TO EXTEND THIS COURT'S ORDER STAYING THE OPERATION OF THE WRIT OF MANDAMUS UNTIL NOVEMBER 14, 1977

The Honorable Hubert L. Will, Respondent, by his counsel, Milton V. Freeman, moves this Court to extend its order of September 16, 1977, staying the operation of the writ of mandamus issued August 15, 1977, until November 14, 1977, to enable him to file a petition for writ of certiorari in the United States Supreme Court in a timely and orderly manner.

Promptly after this Court's August 15, 1977 decision had been filed, Judge Will requested that a petition for writ of certiorari be prepared and filed in his behalf by by the office of the United States Attorney for the Northern District of Illinois. It remains the firm position of Judge Will that this proceeding raises critical issues concerning the extent of judicial discretion and the necessity that a trial judge be allowed to manage his own docket. Nevertheless, late in September, Judge Will's request was denied by the Department of Justice, and he was forced to seek new counsel. Judge Will has only recently retained Milton V. Freeman, Esquire, of the firm of Arnold & Porter, Washington, D. C., to prepare and file a petition for writ of certiorari in his behalf. This petition will be timely filed in accordance with the rules of the Supreme Court.

I have had no previous connection with this litigation. For me as counsel to review the briefs and records in this proceeding, as well as the papers in the underlying litigation in both state and federal court, in order to prepare an appropriate

petition for writ of certiorari will require the full period between now and November 14.

It is respectfully requested that this Court extend its stay of operation of the writ of mandamus and allow Judge Will and me as his new counsel the full period in which to petition the Supreme Court for review.

Respectfully submitted,

/s/ MILTON V. FREEMAN

Milton V. Freeman
Hadrian R. Katz
ARNOLD & PORTER
1229 19th Street, N.W.
Washington, D.C. 20036
202-872-6700

Counsel for the Honorable
Hubert L. Will

Octobet 14, 1977

(Certificate of Service Omitted in Printing.)

United States Court of Appeals

FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

October 17, 1977

Before

Hon. LUTHER M. SWYGERT, Circuit Judge
Hon. _____
Hon. _____

(Title Omitted in Printing.)

This matter comes before the court on the "MOTION OF HONORABLE HUBERT L. WILL TO EXTEND THIS COURT'S ORDER STAYING THE OPERATION OF THE WRIT OF MANDAMUS UNTIL NOVEMBER 14, 1977" filed herein on October 14, 1977. On consideration thereof, this court being fully advised concerning the circumstances of this matter,

IT IS ORDERED that said motion be, and the same is hereby, GRANTED. The operation of the writ of mandamus issued by this court on August 15, 1977 is hereby STAYED to and including November 14, 1977.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

November 15, 1977

Thomas F. Strubbe, Esquire
Clerk, U.S. Court of Appeals
Seventh Circuit
Chicago, Illinois

Re: Will, etc. v. Calvert Fire Ins. Co.,
et al., No. 77-693—Your No. 76-1495

Dear Mr. Strubbe:

At the request of counsel, I am enclosing a certificate evidencing the docketing of the above-entitled case.

Very truly yours,

Michael Rodak, Jr., Clerk

By LORETTA S. RUFFIN

(Mrs.) Loretta S. Ruffin
Assistant Clerk

Enclosure

Supreme Court of the United States

I, MICHAEL RODAK, JR., Clerk of the Supreme Court of the United States, do hereby certify that a petition for a writ of certiorari directed to the

U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

was filed in the office of the Clerk of the Supreme Court of the United States on the fourteenth day of November, A.D. 1977, in the case here entitled

HUBERT L. WILL, JUDGE,
UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF ILLINOIS

Petitioner

vs.

CALVERT FIRE INSURANCE COMPANY, ET AL.

and that the case has been docketed as No. 77-693, and is now pending.

In testimony whereof I hereunto subscribe my name and affix the seal of the Supreme Court of the United States, at the City of Washington, this fifteenth day of November, A.D. 1977.

MICHAEL RODAK, JR.

Clerk of the Supreme Court
of the United States.

By LORETTA S. RUFFIN

Assistant Clerk